APPENDIX A

Decisions of Court Below

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1966—SEPTEMBER SESSION, 1966
Nos. 15266 & 15589

No. 15266

UNITED INSURANCE COMPANY OF AMERICA, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

and

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO, *Intervenor.*

No. 15589

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

and

UNITED INSURANCE COMPANY OF AMERICA, *Intervenor.*

On Petitions to Review and on Cross-petition to Enforce an Order of the National Labor Relations Board.

December 21, 1966

Before KNOCH, CASTLE and SWYGERT, *Circuit Judges.*

CASTLE, *Circuit Judge.* These cases are before the Court upon the petition of United Insurance Company of America

(Company) to review and set aside an order of the National Labor Relations Board issued against the Company July 28, 1965, a petition of Insurance Workers International Union, AFL-CIO, (Union) to review the Board's order to the extent the order denied the Union the full relief it requested, and upon the cross-petition of the Board to enforce its order.[1] A motion of the Company to dismiss the Union's petition was taken with the case on the merits.

The Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by its admitted refusal to bargain with the Union, the certified representative of the Company's debit agents in Baltimore City and Anne Arundel County, Maryland.

The Company is engaged primarily in selling industrial life insurance, a form of ordinary life insurance in which the policies are written in amounts of less than $1,000 and the premiums are payable weekly, and for that purpose maintains district offices throughout the country. Each district office has a manager and several assistant managers, and each assistant manager heads a group of four or five debit agents. These debit agents, so-called for the reason that "debit" describes the agent's book listing the policyholders from whom the agent collects premiums, spend most of their time in the collection of premiums from policyholders residing in a given area. They also solicit applications for new insurance and for fire insurance written by another insurer whose business is also handled by the management and supervisors of the Company.

On June 4, 1964, the Union filed a petition with the Board seeking certification as the collective bargaining repre-

[1] The Union's petition was originally filed in the United States Court of Appeals for the District of Columbia Circuit. The Company thereafter filed its petition with this Court and it was transferred to the District of Columbia Circuit as provided by 28 U.S.C.A. § 2112(a). The Board cross-petitioned for enforcement of its order, and the D. C. Circuit transferred the proceedings to this Court where they were consolidated for hearing and disposition.

sentative of the Company's debit agents in Baltimore City and Anne Arundel County, Maryland. On March 16, 1964, the Company had entered into a reinsurance agreement with Quaker City Life Insurance Company, a Philadelphia, Pennsylvania corporation, under which, among other things not here pertinent, the Company reinsured the industrial life insurance policies issued by Quaker in a number of states, including those in force in Baltimore City and Anne Arundel County, Maryland. Quaker had chosen to maintain an employer-employee relationship with its debit agents, and its agents in Baltimore City and Anne Arundel County were represented by the Union. Upon the effective date of the reinsurance agreement (March 16, 1964) Quaker terminated all of its employees. Some of Quaker's former agents in Baltimore City and Anne Arundel County became agents of the Company. The policies they serviced, and the business they generated, were handled from the Company's Franklin Street district office in Baltimore, a location formerly utilized by Quaker. The debit agents here involved were about equally divided between that office and the company's St. Paul Street district office from which the Company had handled its policies in Baltimore prior to its reinsurance of Quaker's policies and continued to maintain.

On July 6, 1964, the Company and the Union entered into a stipulation for certification upon consent election which by its terms provided that the Company did not waive its contention that the debit agents in the unit were independent contractors and not employees within the meaning of the Act, and that the failure of the Company to contest that issue was limited solely to the representation proceeding. The Union won the election and was certified on August 14, 1964. On August 20, 1964, the Union requested recognition. On September 1, 1964, the Company denied that request. It based its refusal to bargain with the Union on the ground that the debit agents involved are independent contractors and not employees.

The Board ordered the Company to cease and desist from its refusal to bargain, to bargain with the Union upon request, and to post designated notices.

The Board's conclusion that the Company violated Section 8(a)(5) and (1) of the Act is predicated upon the Trial Examiner's findings and conclusions to the effect that the Company's debit agents in the Baltimore City and Anne Arundel County area unit here involved are employees within the meaning of the Act, which findings and conclusions the Board adopted.

The Company contends that the Board's order is not supported by substantial evidence on the record considered as a whole; that the findings and conclusions adopted by the Board are, in material part, the product of subjective conclusions drawn from the trial examiner's personal observations rather than from the evidence; that material comparative testimony, proffered by the Company, was erroneously excluded; and that at the most the testimony of the two witnesses credited and relied upon by the examiner can be regarded as establishing only that the unit was half "employee" and half "independent contractor".

The Union's contentions[2] are limited to its assertions that the Board erred in denying its requests that there be included in the Board's order a specific direction that the Company bargain concerning the fire insurance aspects of the debit agents' activities and a requirement that the Company, from the date of its refusal to bargain until the discharge of its bargaining obligations, apply to all of the debit agents in the unit the terms of a contract which allegedly had existed between Quaker and its former debit agents; and that the Union is entitled to challenge these aspects of the Board's order as a "person aggrieved". The Company's motion to dismiss the Union's petition in

[2] Except for those contentions urged by the Union as intervenor in No. 15266 in support of the Board's order.

No. 15589 challenged the Union's status as an aggrieved person. The Board takes the position that while the Union is an aggrieved person in so far as jurisdictional purposes are concerned, and therefore this Court has jurisdiction of the Union's petition for review, the contentions of the Union with respect to the scope of the Board's order are wholly without merit.[3]

Two years prior to the Union's petition for certification in the instant matter the issue whether the Company's debit agents in Pennsylvania were Company employees or independent contractors was before this Court in *United Insurance Company of America* v. *N.L.R.B.*, 7 Cir., 304 F. 2d 86. This Court there observed:

> "In the instant case, United has chosen to operate its business on the basis that its agents are independent contractors and, of course, it had the complete legal right so to do."

And citing *N.L.R.B.* v. *Phoenix Mutual Life Insurance Company*, 7 Cir., 167 F. 2d 983, and *National Van Lines*,

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[3] In view of our conclusion that the Board's order is not entitled to enforcement the Union's petition in No. 15589, and the Company's motion to dismiss that petition, are moot. Accordingly, we will not discuss the contentions of the parties with respect thereto. Suffice it to indicate that we agree with Board's position that the Union was entitled to petition for review of the Board's order insofar as it denied the additional relief the Union requested but that there is no merit to the Union's complaints. There was no necessity for a specific reference to the fire insurance activities. Bargaining orders need not specify each individual matter upon which an employer must bargain, particularly where, as here, the threshold question is whether there is an obligation to bargain. *Cf. San Antonio Machine & Supply Corp.* v. *N.L.R.B.*, 5 Cir., 363 F. 2d 633, 642. And, there is no basis in the record, either factually or legally, to support the Union's request concerning interim application of an alleged contract.

Inc. v. *N.L.R.B.*, 7 Cir., 273 F. 2d 402, the Court pointed out (304 F. 2d 89):

> ". . . that the employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished, and that it is the right and not the exercise of control which is the determining element. . . . the critical distinction between employees and independent contractors under the Act is the right to control the manner and means by which the agent conducts his business. In determining whether the requisite control of manner or means is present, various tests have been employed."

but

> "The conclusion must be based on the 'total situation' looking at all of the facts in the particular case."

The Court held (304 F. 2d 90):

> ". . . the debit agents are independent contractors. A debit agent is 'on his own'. He sets his own hours of work and work days and makes his own arrangements with policy holders respecting frequency of premium payments. As admitted by the trial examiner, the agent pays his own travel expense, rent, postage, telephone, bond expense and salaries of assistants; he may take holidays when he desires without notice to United. Agents may transfer policies among themselves and are not required to do so by United. An agent retains his own commission from collected premiums. As to selling insurance, the agent '* * * is free to follow the superintendent's suggestion or to devise his own methods.' "

The Court rejected as insignificant the factors relied upon by the Board in support of its conclusion that the agents were employees, and in this connection the Court observed:

> "Suffice it to say, we have carefully considered each of the items and categories mentioned, but we are convinced they do not show, in connection with all the other facts and circumstances, that an employer-employee relationship existed.
>
> There are many businesses, and the sale of insurance is one of them, where the management may make a choice as to the manner in which the business will be conducted. Very often, perhaps traditionally, insurance has been sold through insurance salesmen whose 'tools' are their own initiative and personality and who work on their own time and at their own expense. However, some insurance companies have established an employer-employee relationship such as the company in *N.L.R.B.* v. *Phoenix Mutual Life Insurance Company,* [167 F. 2d 983] *supra.*"

With the critical test firmly established by *United Insurance Company of America* v. *N.L.R.B.,* 7 Cir., 304 F. 2d 86, and the decisions cited therein, and the nature of the various factors which may properly be considered in applying that test illustrated by that decision, we turn to an appraisal of the record before us giving full recognition to the fact that the issue presented is to be determined on the record *in this particular case. National Van Lines, Inc.* v. *N.L.R.B.,* 7 Cir., 273 F. 2d 402, 407.

Under the principles governing our review of the factual findings of the trial examiner, adopted by the Board, those findings are to be accepted if supported by substantial evidence on the record considered as a whole. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474. But this formula for judicial review of the Board's administrative action was recognized in *Universal Camera*

(340 U.S. p. 489) as affording "[s]ome scope for judicial discretion" and approved with the express realization that "[t]here are no talismanic words that can avoid the process of judgment", and the admonitions (340 U.S. 488 and 496) that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight" and that the examiner's findings are not to be "given more weight than in reason and in the light of judicial experience they deserve" and "are to be considered along with the consistency and inherent probability of testimony". And *Universal Camera* makes it clear (p. 488) that:

> "[A] reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

And in this connection *Eastern Greyhound Lines* v. *N.L.R.B.*, 6 Cir., 337 F. 2d 84, reiterates the pertinent observation made in *N.L.R.B.* v. *Elias Bros. Big Boy, Inc.*, 327 F. 2d 421, 426, after a review of the relevant cases, that:

> "In a proper case [the reviewing court] may decline to follow the action of an examiner in crediting and discrediting testimony, even though the Board has adopted the Examiner's findings."

Similarly, in *Portable Electric Tools, Inc.* v. *N.L.R.B.*, 7 Cir., 309 F. 2d 423, 426, this Court had occasion to state:

> "While recognizing that the question of credibility is for the trial examiner, an Appeals Court is not precluded from independently determining what weight certain testimony which he finds credible should be

given when evaluating the evidence on the record as a whole."

and that if the Court is not to be "merely the judicial echo of the Board's conclusion" a Board determination must be set aside when the record clearly precludes that determination from being justified by a fair estimate of the worth of the testimony of witnesses or the Board's informed judgment on matters within its special competence or both.

The trial examiner's decision discusses testimony and exhibits of record bearing on various factors relevant to, and to which the examiner attached significance in, the determination of the debit agents' status as employees or independent contractors. These factors embrace most of those mentioned in our opinion in the earlier case involving the Company's Pennsylvania debit agents (*United Insurance Company of America* v. *N.L.R.B.*, 7 Cir., 304 F. 2d 86). But, on the record in the instant proceeding, the examiner, although professing that he was not overlooking the Company's testimony that in order to meet or avoid the Board's earlier findings (set aside in *United Insurance, supra*) it had advertently set about to and had made changes, including revisions in the manual the Company furnishes its debit agents, to more clearly reflect the independent contractor status; and while finding that the Company does not fix the agent's hours for debit collections and other services on his debit, and that the agent is permitted to retain his commission from the premiums collected, proceeded to find that the testimony concerning certain of the Company's requirements and practices evidenced such right of control as dictated a conclusion that the agents are employees.

In this latter connection the examiner found that (1) the agent is required to make a weekly report and settlement of account at his district office in the morning of a

designated day, use forms specified and furnished by the Company, and comply with its accounting procedures; (2) on the day he so reports there usually is a sales meeting with the district manager which the agent is required to attend, followed by group and individual meetings and discussions between the agents and the assistant manager to whom each agent is assigned; (3) the agent receives assistance from and is subject to supervision by the assistant manager to whom he is assigned; (4) transfers of policyholders between agents are subject to Company approval; and (5) the Company pays travel expenses, provides rent, postage, and telephone, as well as office space in its district office for the agent's use when he comes in to make his weekly report and accounting, and to pick up mail and telephone messages.

We find no support in the record for some of these findings and but tenuous support for others. Those which are supported by substantial evidence are, in our opinion, consistent with an independent contractor status. They are not indicative of an existence or exercise of control directed to the "manner and means" by which the result to be produced by the agent is to be accomplished, but only of the application of those financial controls, accounting procedures, and business methods and practices which would appear to be normal to the operation of the premium collection phase of the Company's business whether it be carrier on through debit agents who are employees or who are independent contractors.

There is lack of evidentiary support for the examiner's findings that the Company pays travel expenses and furnishes rent, postage and telephone. In this respect the record merely discloses that where the policyholders making up an agent's debit are dispersed over a large area his commission is 1% more than the normal rate. There is no payment of the agent's actual travel expenses. The record does not establish that the Company furnishes or reimburses the agent for postage. It shows only that if

a policyholder mails a premium to the district office together with his premium receipt book the Company mails the book back to the policyholder at its own expense. With respect to "rent", "telephone" and the furnishing of "office space" the record divulges only that during the three or four hours a week the agent spends in the district office of the Company, usually on the morning when he makes his weekly report and accounting, tables and chairs are made available in the district office which the agent may use while preparing his report. Likewise, the agent may occasionally use the Company telephone while he is in the district office or receive a telephoned message which has been left for him.

There is testimony that where a policyholder moves from the area serviced by the debit agent or the agent secures a new policyholder outside of the area normally serviced by him[4] he may arrange, subject to Company approval, with the agent who does serve the area involved for a transfer of the policyholder to the latter. There is other testimony that transfers are freely made between agents without first securing Company approval. In any event, it is our opinion that this transfer of business factor is not of critical significance. Both from the standpoint of the extent of the area in which an agent is to have responsibility for premium collections, and for the purpose of financial accounting with the agent, Company concern with such transfers and its need for knowledge of the same is readily apparent.

There is testimony, some of which is not harmonious, concerning the "assistance" furnished and "supervision" exercised by the Company assistant managers, each of whom is assigned a group of four or five debit agents. Thus, while it appears that the assistant manager's association with the debit agent continues after the agent's initial training period, and the assistant manager may determine

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[4] Each agent has a state-wide license to solicit insurance and is not restricted by the Company in obtaining new business.

if and when he elects to accompany the agent on his rounds in the servicing of his debit, there is also testimony that the primary purpose for so doing is to assist the agent in the conservation of business—the calling on policyholders in connection with lapsed policies—and aiding the agent in procuring new business on which the latter receives the commissions. The assistant manager reviews the agent's reports, requires him to make necessary changes if the accounting is not correct, and cautions the agent about poor production when necessary. During periods of an agent's absence from his debit for a week or more because of illness, or while taking a vacation, the assistant manager, if available, will take over for the agent. Thus, while the assistant manager assists the agent and "supervises" the agent in the latter's relationship with and accounting to the Company it is hardly a supervision which entails the control of the "manner and means" as distinguished from the results the agent is required to obtain. The Company is entitled to insist that the debit be adequately serviced and that a proper accounting of premiums collected be made whether such servicing and collection is carried on through employees or independent contractors. Inadequate results or failure in monetary remittance to the Company would in the absence of corrective action require termination of the relationship in either case.

The testimony concerning attendance of sales meetings and with respect to discussion conferences with the assistant manager on the occasions of the weekly reports to the district office if appraised as evidencing Company insistence upon such attendance is, nevertheless, equivocal. The continuity of the relationship involved and the mutual interest of the parties in the result to be obtained make it imperative that the agents be kept informed with respect to changes in the insurance contracts the Company offers and desirable that they be made aware of incentive programs sponsored by the Company to stimulate sales efforts.

The trial examiner's appraisal of the testimony upon which his findings relating to the above factors were predicated was made on the basis of a credibility resolution that the General Counsel's chief witness, Ronney E. Scott, former employee-debit agent of Quaker and the chairman of the Union's local, whose display of "evident partisanship" was recognized, "was a reliable witness" and "I credit his testimony generally" as contrasted to what the examiner characterized as "the patently unreliable aspects" displayed by the Company's witnesses.[5]

And the appraisal of the testimony so made by the trial examiner, and the resulting findings he made from the testimony he credited, were accompanied by and made in the context of his observation that:

> "To the extent if any that I may rely on demeanor in the hearing room, I would now report that without exception the agents did not display or appear to have attributes of independence (not even when the 'ringleader' appeared to assert himself as he testified), but acted and appeared to be regarded as rank-and-file employees, not of high rank either in fact or in regard."

and of his reasoning, set forth in a footnote, that:

> ". . . there appears to be no good reason for excluding demeanor in the courtroom when the witness is not on the stand and where it is clearly observable as in

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[5] The General Counsel presented the testimony of two witnesses, Scott and Don Ramon Jenkins, both of whom were members of the Union and had been employee-debit agents of Quaker before becoming agents for the Company. Jenkin's comparatively abbreviated testimony supported that of Scott in some particulars. The Company presented the testimony of four of the debit agents, and it was stipulated that the testimony of six others, identified for the record, would be of the same general tenor as that of the four who testified. Additional Company witnesses included its vice-president and general counsel, its agency vice-president, and the district manager, who was formerly a Quaker manager.

this case; . . . * * * Without attempting to detail the basis for this necessarily subjective finding, and allowing for an independent contractor's possible concern over renewal or termination of his contract, I can here declare that I observed a uniform and marked deference by agents toward supervisors and company officials which, without obsequiousness but beyond the sometimes elusive requirements of courtesy, is decently characteristic of common attitudes between employees and supervisors; and which in such uniformity differs from the normally observable attitudes between independent contracting parties."

A witness' demeanor as a criterion of credibility is generally related to a witness' manner while on the stand or manner of testifying. And although the off-the-stand appearance or conduct of the witness may properly be considered in determining his credibility when it constitutes an observable physical fact, the off-the-stand demeanor here relied upon by the examiner was not based on his observation of a simple physical fact but was predicated upon such subtle manifestations of human reactions as "obsequiousness" and "courtesy" to which the examiner applied his own view or predilection as to what attitudes are "characteristic" of relationships between employers and employees and between independent contracting parties. In our opinion resort to conclusions drawn from the application of such an elusive subjective standard as the examiner here puts forth is improper and that conclusions so drawn do not afford an acceptable basis for a credibility appraisal much less can they supply any independent evidentiary content. *Kovacs* v. *Szentes,* 130 Conn. 229, 33 A. 2d 124.

In adopting the trial examiner's findings, conclusions, and recommendations the Board specifically disavows reliance upon the demeanor "observation" made by the examiner. But we do not perceive how this disavowal

can serve to remove from the examiner's findings and conclusions the flavor with which his demeanor observation tainted them. *Cf. Wheeler* v. *N.L.R.B.*, D.C. Cir., 314 F. 2d 260, 263; *N.L.R.B.* v. *American Federation of Television and Radio Artists*, 6 Cir., 285 F. 2d 902, 903. Our study of the record leaves us with a distinctive impression that the flavor of the demeanor observation and accompanying rationalization not only pervades the examiner's credibility resolutions, and thus taints the findings and conclusions resulting from the testimony so credited, but also that independent evidentiary content and force may well have been given, albeit undesignedly, to the "employee attitude" the examiner so tenuously surmised was reflected by debit agents' off-the-stand demeanor.

Thus, in addition to the infirmity of some of the critical findings from the standpoint of lack of substantial evidentiary support, and the insignificant or equivocal nature of the factors embraced in other findings, we are confronted with a record which, when viewed in the light consideration in its entirety furnishes, is revealed to be tainted with a flavor which precludes us from conscientiously relying upon it as adequately supporting the Board's determination and order. There is too much which detracts from the weight of the evidence relied upon to support the findings and conclusions.

The Company's petition to set aside the Board's order is granted, and, consequently, the Board's petition for enforcement of its order is denied.

ORDER SET ASIDE
AND ENFORCEMENT DENIED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED INSURANCE COMPANY OF AMERICA, a corporation,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 13500

United States Court of Appeals
Seventh Circuit

June 12, 1962

As Amended July 2, 1962

Before DUFFY, KNOCH and CASTLE, Circuit Judges.

DUFFY, Circuit Judge.

Petitioner (United) seeks to review a decision and order of the National Labor Relations Board (Board) dated August 10, 1961. The Board has filed a cross-petition for enforcement of that order.

This case is here for the second time. On the first occasion, we set aside the Board's order (272 F. 2d 446), holding the Board had not afforded United procedural due process. We remanded the case "for a full hearing and decision based upon a consideration of all relevant evidence."

The decision and order of the Board here challenged requires United to bargain collectively with Insurance Workers' International Union, AFL-CIO, (IWIU) as the collective bargaining agent for the licensed debit agents who serve United in the State of Pennsylvania. The principal issue is whether these licensed debit agents are independent contractors or employees of United.

In 1953, Local 5, Insurance Workers of America, CIO, filed a petition for certification with the Board. About one month later, Insurance Agents' International Union, AFL,

filed a petition also seeking certification. These petitions were later voluntarily dismissed and withdrawn respectively. About two and a half years later, Insurance Agents' International Union, AFL-CIO, petitioned for certification. An agreement was entered into by this Union and United for a consent election with the specific understanding that United would not waive its position that the debit agents were independent contractors.

An election and a re-run election were held, and the Insurance Agents' International Union, AFL-CIO, won and was certified. United refused to bargain, claiming that it was under no obligation to bargain with the Union because the debit agents were not its employees but were independent contractors.

United issues commercial and industrial life, health and accident, and hospitalization insurance policies. Under Pennsylvania law, Industrial Life Insurance Policies of less than $1000 are sold on a weekly premium basis. The debit agents are engaged primarily in selling and collecting premiums on industrial life insurance policies issued by United. However, at times, they do collect premiums on other types of insurance policies issued by United.

In our previous opinion, we observed that in many respects a debit agent has the attributes of an independent contractor, and we listed some of them. We also said that there are some aspects of the duties of debit agents which might indicate their status is that of employees of United. In view of our disposition of the first appeal, we did not reach the issue of whether the licensed debit agents are independent contractors or employees.

On February 8, 1960, the Board reopened the record and remanded the case to the trial examiner "for the purpose of receiving additional evidence consistent with the Court's remand." A hearing was scheduled.

Prior to the hearing date, United moved to transfer the proceedings to the representation docket, principally on

the ground that three years had elapsed since the Insurance Agents' International Union (IAIU) had been certified in a close election. United claimed that the disposition of the matter in a representative proceeding would be appropriate to determine both the jurisdictional employee status issue and the current representative status of the certified Union. The motion was referred to the trial examiner and was denied.

On March 25, 1960, three days before the scheduled hearing, counsel who had represented Insurance Agents' International Union disclosed to United's counsel that the certified Union was no longer in existence. It was finally disclosed that in early 1959, prior to the time this case was first presented to this Court, the Insurance Agents' International Union had merged with the Insurance Workers of America and a new union had been formed known as the Insurance Workers' International Union, AFL-CIO, (IWIU). United then renewed its effort to have the case transferred to the representation docket. The Board denied United's request for leave to appeal the examiner's ruling denying the motion to transfer.

In the 1957 hearing, the Board declined to receive or consider the testimony of one Jack Borman which was offered by United. Counsel for United then made an extensive offer of proof. Borman operates a large enterprise which sells and services insurance policies for United in Pennsylvania. It has acted in such capacity for a considerable period of time. It is and has been subject substantially to the same instructions, report requirements and other procedures in its relationship with United as are the debit agents involved in this proceeding. The purpose of the testimony was to demonstrate that the so-called "controls" relied upon by the Board as showing the agents to be employees, applied equally to the Borman enterprise, which no one contended made them employees of United.

At the new hearing, there was no new evidence on the basic question of employee status. The parties stipulated

that the record in the prior proceeding should be considered a part of the record in the current proceeding. United again offered the testimony of Mr. Jack Borman, but it was again excluded by the examiner on the same basis as in the prior proceeding. The parties stipulated that if the Board found the exclusion of Borman's testimony to be error, United's offer of proof would be accepted as the entire testimony of Mr. Borman.

In his Supplemental Intermediate Report of July 29, 1960, the trial examiner recommended the Board dismiss the complaint against United because the certified Union which had filed the complaint in 1957 no longer existed, and that IWIU which purported to replace IAIU was not a certified representative of United's debit agents in Pennsylvania.

On September 28, 1960, the Regional Director issued a decision and order amending the 1957 certification by substituting IWIU for IAIU. United's request for leave to appeal this order was denied. On December 6, 1960, the Board issued a decision and order granting IAIU's motion to amend the name of the charging party to IWIU.

On March 24, 1961, the trial examiner filed a Second Supplemental Intermediate Report concluding that United's debit agents were employees, and recommended the Board reissue the order originally issued in this case on January 14, 1959, except that the Insurance Workers' International Union, AFL-CIO, should be substituted for Insurance Agents' International Union, AFL-CIO. On August 10, 1961, the Board adopted the trial examiner's findings, conclusions and recommendations.

In 1947, Congress amended the National Labor Relations Act so as to prohibit the National Labor Relations Board from assuming jurisdiction over independent contractors.[1]

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[1] Sec. 2(3), 29 U.S.C.A. § 152(3).

It is conceded the amendment was intended by Congress to nullify the Supreme Court ruling in N. L. R. B. v. Hearst Publications, Inc., 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170.[2]

In National Van Lines, Inc. v. N.L.R.B., 7 Cir., 273 F. 2d 402, 404-405, we quoted from a previous decision of this Court, N. L. R. B. v. Phoenix Mutual Life Insurance Company, 7 Cir., 167 F. 2d 983, at 986: "* * * This court there pointed out that the employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished, and that it is the right and not the exercise of control which is the determining element. * * *"

Thus, since 1947, the critical distinction between employees and independent contractors under the Act is the right to control the manner and means by which the agent conducts his business. In determining whether the requisite control of manner or means is present, various tests have been employed.

Consideration is given to such items as the right to hire and discharge; the method of payment; who furnishes the tools and materials used; who designates the time and place for the work to be done; and the intention of the

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[2] See N. L. R. B. v. Steinberg, et al., 5 Cir., 182 F. 2d 850, 854-855, which discussed the legislative purpose The House Committee Report reads, in part, as follows: "An 'employee', according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of National Labor Relations Board v. Hearst Publications, Inc., 1944, 322 U.S. 111 [64 S. Ct. 851, 88 L. Ed. 1170], the Board expanded the definition of the term 'employee' beyond anything it had ever included before, and the Supreme Court relying on the theoretical 'expertness' of the Board, upheld the Board. * * *"

parties. Usually, no one of these categories is decisive. The conclusion must be based on the "total situation" looking at all of the facts in the particular case. National Van Lines v. N. L. R. B., 7 Cir., 273 F. 2d 402, 407.

We hold the debit agents are independent contractors. A debit agent is "on his own." He sets his own hours of work and work days and makes his own arrangements with policy holders respecting frequency of premium payments. As admitted by the trial examiner, the agent pays his own travel expense, rent, postage, telephone, bond expense and salaries of assistants; he may take holidays when he desires without notice to United. Agents may transfer policies among themselves and are not required to do so by United. An agent retains his own commission from collected premiums. As to selling insurance, the agent "* * * is free to follow the superintendent's suggestion or to devise his own methods."

The examiner listed certain categories which he said indicate the relationship of employer and employee existed. He considered significant that each agent was assigned to the staff of a particular superintendent, and that certain reports are made by the agents.

When United needs a new agent, he is given a debit within the territory of a particular office. To the extent permitted by insurance laws, an agent is free to choose any of these centers and usually selects one which is geographically convenient although other factors may be significant to him. But no agent may be transferred except at his own request, and he may sell and service policies anywhere in the state.

There is nothing under this heading which shows United has taken from the agent his freedom of choice of manner and means. The reports mentioned by the examiner are no more significant than would be the situation where a manufacturer requires reports from its manufacturers' representative.

Another reason listed by the examiner for his conclusion is his claim that United assists its agents in their functions; that superintendents accompany new agents on their rounds and that sales meetings are held.

United does offer assistance to its agents but only to those who desire to receive same. Sales meetings are conducted but attendance is entirely voluntary. Some agents never attend such meetings. We think there is nothing in such practices inconsistent with an independent contractor relationship.

The examiner thought it significant that United makes group insurance plans available to groups of persons including its agents. Here the agents pay the full cost of the plan. Many organizations provide group insurance plans. The American Bar Association has a group insurance plan, but it is obvious that because there of, the relationship between the ABA and its members does not thereby become one of employer and employee.

The examiner relied upon the fact that rate manuals were owned by United. We think this is of no significance. Rate manuals in the insurance business are like a price list. A salesman must know the price of what he sells.

The examiner discussed other reasons and categories. It would unduly extend this opinion to discuss each in detail. Suffice it to say, we have carefully considered each of the items and categories mentioned, but we are convinced they do not show, in connection with all the other facts and circumstances, that an employer-employee relationship existed.

There are many businesses, and the sale of insurance is one of them, where management may make a choice as to the manner in which the business will be conducted. Very often, perhaps traditionally, insurance has been sold through insurance salesmen whose "tools" are their own initiative and personality and who work on their own time

and at their own expense. However, some insurance companies have established an employer-employee relationship such as the company in N. L. R. B. v. Phoenix Mutual Life Insurance Company, supra.

In the instant case, United has chosen to operate its business on the basis that its agents are independent contractors and, of course, it had the complete legal right so to do.

Other questions have been argued by the petitioner and the Board. However, as we have decided the fundamental and underlying question in this case, a decision on the other points need not be reached.

The petition for review is granted, and the cross-petition for enforcement of the order is denied.

APPENDIX B

Statutory Provisions Involved

National Labor Relations Act, as amended, 29 U.S.C. §§ 141 et seq.:

Section 2.(3), 29 U.S.C. § 152(3)

Sec. 2. When used in this Act— * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Section 7, 29 U.S.C. § 157

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8.(a)(1)(5), 29 U.S.C. § 158(a)(1)(5)

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 10.(e)(f), 29 U.S.C. § 160(e)(f)

Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole

shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing

of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.